

Case Studies for training UK lawyers

on substance abuse

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This paper contains some examples of materials used to provide training for lawyers in the UK on the subject of substance abuse.

1 CLE EUROPE

The “Consortium for Continuing Legal Education in Europe” (CLE) was established in 1992 to help US attorneys practising in Europe to meet the Mandatory Continuing Legal Education (MCLE) requirements of their state bar. These requirements could not always easily be met by legal training otherwise available in the UK, much less on the continent of Europe. So every year a 2 day "Fair" on a variety of legal subjects, including substance abuse, is held. CLE is the only body in the UK which provides education specifically for lawyers on substance abuse related topics.

The subjects covered at the fair seem to have no necessary connection with each other, except in their focus on MCLE requirements and on the more general needs of expatriate US lawyers. Most of the lawyers who attend are called to the California or New York State Bars. Many of them are inhouse counsel to European subsidiaries of US corporations, others work in European offices of Major US law firms or for European commercial law firms. There are some UK lawyers who have also qualified in the US. The great majority have commercial practices (covering, for instance, company law, corporate finance, banking and financial services, tax, and competition) although there are a few with "high street" type practices.

In January 2000 I was invited to provide training on substance abuse¹ at the Annual "CLE Fair" of the Consortium for Continuing Legal Education in Europe (CLE)².

In January 2002, I again organised the "substance abuse" session within the CLE Fair and invited His Honour Judge Charles Elly³, Mrs Bronwen Still⁴ and Mr. Richard Steele⁵ to help. It was agreed that we would try an interactive format. A series of case studies raising issues

¹ My paper was subsequently published as *Alcoholic Clients and Alcoholic Lawyers* in the Solicitor's Journal for 10th and 17th March 2000

² <http://www.CLEEurope.com>

³ Whose views on lawyer alcoholism are quoted above. Judge Elly was chairman of SolCare (renamed LawCare in 2001) between its foundation in 1997 and his appointment as a full time circuit judge in 1998.

⁴ A Law Society official and trustee of LawCare.

⁵ A practising solicitor and trustee of LawCare.

of alcohol and the law were prepared⁶. The 100 or so CLE participants were divided into 9 groups. After a 20 minute introduction each group was assigned a case study and given 50 minutes to discuss it, and report back on it in writing, the time available not allowing for an oral report in plenary session on the outcome of the discussions. A facilitator was appointed for each group.

The outcome of the group sessions is set out below.

2 CASE STUDY 1: PROBLEMS ABOUT REFERENCES

2.1 The problem

The first case study was concerned with issues arising around the giving of references for former partners. It read as follows:

Part 1

Perry & Mason are a large City firm of solicitors. Lionel Smith trained with the firm and was an assistant solicitor for 4 years and then a partner for 10 years. He was successful and well respected until the last 3 years when he developed a drinking problem that became progressively worse, resulting in his expulsion following a series of unpleasant incidents. He went straight into another City firm, Green & Brown, where he became a partner but left again after a month. After that P&M did not have any contact with Smith for over a year apart from hearing from one of his friends that he had gone into treatment for addiction.

At this point Perry, senior partner of P&M, is telephoned by Smith, who explains that he has had an offer of a job as a legal adviser with Barchester City Council and that he has put his problems behind him. He wants Perry to give him a reference. What should Perry Do?

Part 2

Perry agrees to give Smith a reference. Mr. White, the Senior lawyer at Barchester City Council, calls Perry over the telephone. Perry gives White a positive account of Smith's record with the firm up to the last 3 years. He says nothing about his drinking problem. The Council offer Smith the job, which is accepted. However, before it is taken up, somebody tips off White about Smith's drinking record. White calls Perry again, who, very embarrassed, confirms what happened during Smith's last years with the firm.

⁶ I prepared case studies 1,2,3,5, and 7. Judge Elly prepared case studies 4 and 6, and Mrs Still prepared case study 8.

White wants to withdraw the offer. Smith wants to hold him to it, or, if it is withdrawn, to sue Barchester City Council and/or P&M. What are the legal merits of each position and how might the issue be resolved in a manner satisfactory to all the parties?

2.2 The discussion

One member of this group identified himself as a "recovering alcoholic" who had been abstinent for 14 years. As a very young lawyer he had worked in house and been responsible for "entertaining". He had developed a drinking problem. He had later moved into a firm in private practice.

His partners had not known how to handle the problem. The senior partner had written him a letter saying in effect, "If you do it again, you're out." This approach had not worked. He had ultimately come to terms with his problem and stopped drinking through a self-help group.

The view was expressed that the Law Society's response to the problem through LawCare had been insufficient. The subject was still "taboo" within the profession, unlike the position in the USA. Sometimes the culture within a firm can be a contributing factor (e.g. when young lawyers are given an "obligation" to entertain). One comment was to the effect:

"everyone avoids the problem. No one knows what to do, so they do not try to intervene, especially when the person concerned can still do the work"

Every member of the group knew of persons whose drinking was affecting their performance. One member of the group knew of a former colleague who had had a drinking problem and had re-emerged in another firm which had not a sought reference.

One member of the group worked in a UK firm with no alcohol policy but which provided a "help line". He expressed the view that where a person had problems partners would help, but would probably not point out to anyone that they were alcohol related.

A lawyer, X, who worked on the Continent, and whose female colleague, Y, had a drinking problem, had spoken to Y's secretary (who was aware of the problem and willing to discuss it) and ultimately paid for her to have some counselling. The rules in the jurisdiction in question did not permit Y to be dismissed. Ultimately Y had got an offer of a job from another firm. The reference had hinted that she had a problem that she was "working with", thus leaving open the question whether it was being successfully addressed. X expressed the view that forcing people to have treatment did not work.

Was that a "fair reference"? Should references be given over the telephone? One group member thought they should not.

If you know there is a problem, how do you prove it? Decline in performance can lead to the point where the lawyer concerned may be subjected to disciplinary proceedings. But what if

it is not interfering with the job? Can you be sure that it is not? Should the firm interfere with drinking outside job hours?

Another group member felt that nothing would stop an alcoholic from drinking and that the best thing was to take his job away.

How should one get the alcoholic to face up to his problems? One suggestion: 2 of his partners, together with his wife, should confront him, tell him that what he is doing is wrong and persuade him to accept treatment⁷.

If the work is not up to par, can he be sacked or should the problem be treated as a medical issue, as may be the practice in enlightened firms? Comparisons were drawn between the position in the UK under the Disability Discrimination Act 1995 and in the USA under the Americans with Disabilities Act.

As to whether a reference should be given, one view was that if the alcohol problem was common knowledge within the firm, the reference should be qualified, but not if the problem was private.

Did Perry have a responsibility to ask Smith if he had put his problems behind him? Should Perry have asked Smith to meet him before giving the reference and for evidence that Smith was getting appropriate help?

Should a firm have a policy of not employing a "recovering alcoholic" until he had been sober for, say, 2 years and was prepared to answer clearly any concerns?

3 CASE STUDY 2: THE ALCOHOLIC DIVORCE CLIENT

3.1 The Problem

Stephen is a partner of a small provincial firm of solicitors. One of his longest standing clients is Peter, who for many years was a successful businessman. Over the years Peter has given a lot of legal work to Stephen's firm. Stephen has also mixed with Peter socially and met, but not particularly liked, Peter's wife, Ruth. Peter and Ruth have 2 children aged 6 and 8.

More recently, however, Peter has gone down hill. His business is in financial difficulties. Stephen has seen Peter get drunk and behave aggressively at drinks parties. Stephen has a vague feeling of guilt about Peter. "What can I do to help him?" he wonders.

⁷ This is a method of confronting problem drinkers which has given rise to some controversy. Opponents claim that it can be psychologically damaging. Not to be contemplated without taking appropriate professional advice.

Peter's marriage hits the rocks. Following a row, his wife, who claims that he has been physically violent, gets an *ex parte* injunction requiring him to vacate the matrimonial home. Ruth is also refusing to let him see the children, or to collect his belongings from the house, except on the basis that her solicitor attends at Peter's expense (£250 per hour).

Peter consults Stephen's firm at a time when Stephen is away on holiday and is interviewed by Stephen's newly qualified assistant, Susan, who has just joined the firm from the commercial litigation department of a City of London firm. By this time Peter is insolvent. He cannot put the firm in funds. An application for legal aid is refused.

An appointment is made for Peter to see Stephen and Susan on the day after Stephen's return from holiday. Peter denies Ruth's allegations. He wants to apply to set aside the injunction and to apply for contact with his children. Peter's mother is thinking of lending him the money to pay for the costs but wants an assurance that his case is not hopeless.

If you were in Stephen's position, what advice would you give and how would you handle the situation? What kind of guidance might you give to Susan as to how to deal with the matter on a day to day basis?

3.2 The Discussion

The first step was to evaluate whether there is a potential conflict of interest due to possible private knowledge of other party (the wife). If the firm has prepared a will for her, for instance, it would have to regard itself as disqualified from representing Peter.

Who is the client if the mother pays the bills? It was important to establish the payment relationship and method and to get informed consent or clearance from Peter to speak openly and frankly to his mother.

Stephen will need to stay involved in the case as close supervisor of Susan, while avoiding the appearance of putting the firm's interest (in particular its financial interest) ahead of the client's interest.

Stephen should advise Susan that:

- all advice should be recorded in writing,
- she should avoid looking at causation of the divorce as an issue in its own right: look at the legal issues,
- she should evaluate how the property could be divided and the issues be resolved practically in accordance with the law,

- the issue of contact with the children will require Peter to face up to and deal with his drinking problem, but it is not the role of a lawyer to act as therapist.
- manage the client with clearly articulated parameters and limits. This includes length and number of telephone calls and general behaviour. She should not promise what cannot be delivered.

Stephen should intervene if the client does not behave properly with Susan.

On the question of access to the matrimonial home, it was suggested contacting Ruth's lawyer with a view to meeting on a "pro bono" basis to enable Peter to collect his belongings.

4 CASE STUDY 3: THE ALCOHOLIC EMPLOYMENT CLIENT

4.1 The Problem

Derek is a partner in the employment department of a major City firm of solicitors. He usually represents employers, but occasionally acts for the other side. He has agreed to act for Henry who is the Marketing Director of a major plc.

Henry has had a meeting with his colleagues in the course of which they asked him to resign. They say that he has a drinking problem which he has been asked several times to do something about. Moreover a senior female executive, Alice, with the company, has recently resigned with a payout of £30,000 for damages for alleged sexual harassment by Henry. Henry claims to have taken and followed medical advice on his drinking problems and to have his drinking under control. He admits that he went out for lunch with Alice several times but claims that she was receptive to his advances and made the accusation against him completely out of the blue.

Henry would prefer to keep his job. He is willing to resign but only in return for a very large payout. His employers have made it clear that if agreement cannot be reached they will sack him.

Derek arranges for a 2 year assistant solicitor, Mary, to deal with Henry's case under his supervision. She finds him to be a difficult client who takes up a lot of her time and gives her a lot of unnecessary stress, although Henry professes the deepest, almost embarrassing, admiration for his legal team. On several occasions when Mary has spoken to Henry over the phone he has sounded very much the worse for wear. Mary finds that Henry absorbs most of her energy and that she cannot stop thinking about his case even after work.

Derek is concerned about the number of chargeable hours that have ticked up on Henry's ledger. He is under pressure from his colleagues to get more money on account even though Henry cannot afford it as he is paying maintenance to 2 ex-wives and 5 children. Henry's mother is willing to help him out with a loan but she wants an assurance from Derek that her money will not be wasted.

How should Derek approach these issues to ensure that Henry's case is appropriately handled in his interests and without taking up an undue proportion of his firm's resources?

4.2 The Discussion

The majority view of the group was that the evidence against Henry was largely in the balance with the harassment of Alice being unsubstantiated at this stage. However, Henry has been asked to stop drinking on a number of occasions and on balance it was considered that this would count against him. He would probably lose his employment if correct disciplinary and grievance procedures had been used. A pay off would not have been necessary.

Intervention at an earlier stage would have been preferable and might have stopped the deterioration. It was the majority view of the group that the only person who was in control of the process was Henry himself. It was the firm view of the majority that if he was still denying his behaviour at this stage it was not within the remit of the solicitor/client relationship to suggest remedial action and this would violate the professional boundaries of that relationship.

Whilst the employer may have tried to address the matter with Henry in the past this had clearly failed and the majority view was that there was nothing to be gained in trying to counsel Henry now.

Mary would have to have firm boundaries with limits on costs and interim billing with specific times when the client would be given attention. One or two members of the group wondered whether it was wise for a woman to be allocated to the case, given Henry's alleged behaviour. Mary would need support and back up dealing with Henry who would tend to drain the energy of any person trying to help him.

It would be a breach of confidentiality to involve Henry's mother in an assessment of the merits of the case without his consent, expressly given.

One member of the discussion group identified himself as a recovering alcoholic. He took the view that Henry's drinking was a manifestation of deeper problems that needed to be addressed at an earlier stage in the employment relationship with offers of treatment. Another member of the group suggested that if the employer had an alcohol policy with a testing procedure, liver function tests might have shown up the problem. This test had been used with some degree of success by other professions. Intervention by the employer might have been more effective had it been tried along these lines.

One member of the group who identified himself as an employment lawyer suggested that had Henry not been in denial he might have had the protection of the Disability Discrimination Act 1995 which covers problems such as depression and anxiety disorders which often underlie alcoholism. The employer would have been required to consider reasonable adjustments for Henry but this would only have been required if Henry had accepted his problems.

The majority considered that in his current state of denial there was little that could be done within the solicitor client relationship other than to try to protect his legal and financial interests.

5 CASE STUDY 4: ETHICAL PROBLEMS AND THE DUTY TO REPORT

5.1 The Problem

David is a Partner in a large City firm of Solicitors. His client, Mammoth Corporation plc, is being sued by Littlemen Ltd. Frank, who is a member of a two-partner firm with a niche practice in commercial litigation, represents them.

David has not dealt with the firm before, but he is aware that they have a good reputation in their limited field of practice. He wonders how they can attract clients and be profitable in this field with such a small firm.

There seems to be some room for compromise. They agree to meet, Frank suggests a convenient bar one evening. David is surprised, but on the explanation that Frank is too busy during the day, he agrees.

At the meeting, it is clear that Frank is well known in that Bar. David is surprised at the amount Frank is able to drink. Frank also discloses that the firm is having a difficult time, but his life-style seems to rely on a good income.

The action is settled. Mammoth are to make substantial payment to Littlemen. David asks for the Bank details of Frank's firm, so that the money can be transferred. Frank asks for the money to be paid to their office account. He says this will enable payment to be made to his client more quickly.

David is concerned that the money may be misapplied. What action should he take:

- (a) to protect his client
- (b) to protect the profession?

5.2 The Discussion

The group started with an exchange of personal experiences:

- one participant mentioned that an associate had "dropped the ball" on two cases. The fact that he had a problem with drink was not spotted until too late,
- difficulty spotting the problem - the alcoholic may behave irrationally even when sober. Drunkenness during working hours and smell of alcohol on breath are not the only symptoms,

- problems are not confined to cases where the drinker is the employee, client or partner, but can include where he is "the other side",
- a colleague whose behaviour was very erratic. Sometimes he was obviously drunk or under the influence. People who were supposed to address the problem did not.
- symptoms include:
 - lying and covering up,
 - web of concealment,
 - excessive absences,
 - backdated letters/cheques,
 - forgery.

Should the profession take pro-active efforts to identify the problem?

How is problem drinking to be distinguished from moderate drinking? How is "dependence" defined and is the distinction partly dictated by cultural attitudes? Are those attitudes changing?

In relation to the case study it was agreed that payment by Frank of the money into client account was contrary to Law Society rules. It had to go into client account or directly to Frank's client, the latter being the best solution for David to the extent that there was any urgency. David should ask for a receipt or bank confirmation.

As to protecting the profession:

- if you have a suspicion of misconduct which is substantiated, there is a duty to report the facts to the Law Society,
- should one confront the problem drinker himself (Frank)? Very difficult and it will depend on the circumstances (including how confident David feels about doing this) whether it is an appropriate thing to do,
- possibly one should speak to his partner (if any - some differences of opinion on this issue), but partner may have a similar problem,
- how should Law Society respond - sorting out legal obligations, intervention, monitoring?

Some participants were not comfortable about the ability of the Law Society to deal with these issues.

Comparisons were drawn as to how US State Bars dealt with these issues.

How should denial of alcohol related problems be penetrated both at professional and societal levels?

How important is it to understand about substance abuse or learn about it:

- the group recognised the value of education on the subject,
- according to some libertarian views one should not interfere with a problem drinking colleague unless work is affected,
- lawyers should be able to recognise alcohol problems and in appropriate circumstances encourage employees to have counselling or make that counselling available,
- is education needed to be able to deal with problem clients?
- answer may depend on seniority of the lawyer and who is the "problem".

Are American attitudes different from British ones on alcohol related issues? Does the level of damages awarded in the US courts compel people to address issues such as these, or is American culture more "upfront"?

6 CASE STUDY 5: THE IN-HOUSE LAWYER WITH A DRINKING PROBLEM

The participants allocated to this case study were mostly in-house lawyers, and the case study was discussed within two distinct groups.

6.1 The Problem

Julia is the Chief General Counsel of Microhard Inc, a multinational computer company, whose headquarters is in San Francisco. She is currently seconded for six months to the London subsidiary of Microhard, Microhard (UK) Ltd.

It became quickly apparent to Julia that the senior lawyer in London, John, has a serious drinking problem.

In theory, the UK company has an alcohol policy, covering the health and disciplinary aspects of substance abuse, but historically no-one has taken any notice of it because the HR department is overstretched and views it as a low priority.

The decadent British attitude to drinking is very much apparent within Microhard UK. The company provides free health insurance, but this excludes treatment for alcohol dependence (the cost of a policy which covered alcohol was judged to be too high). John is one year through a five year fixed term service contract, which provides for dismissal for "gross misconduct", but otherwise contains no obviously relevant provisions.

Julia confronts John about his problem. John tells Julia that he has already sought psychiatric help. His doctor has told him that his problem is depression, not alcohol dependence, although his doctor has advised him to reduce his drinking, which he claims to have done. They agree that John should take 3 weeks off for treatment at the clinic at which his doctor is one of the consultants. However, when John comes back there is no obvious improvement in his performance or his sobriety.

How should Julia try to resolve the problem? What legal issues arise? What can she do to change the corporate attitude?

6.2 The Discussion - First Group

The first group noted that within California, the State Bar had established that a large proportion of lawyers who were the subject of disciplinary proceedings had substance abuse problems.

The following questions arose from the case study:

- is dismissal an option?
- does the company have a policy?
- how does the problem affect performance?
- what are the potential liabilities for unfair dismissal?
- what are Julia's qualifications for dealing with this problem?
- is there a discrimination problem?

One should confront the human issues as well as the employment law issues.

It was important to collect evidence of how John's performance in his job was affected, whether a similar problem had arisen before and how it had been dealt with.

Even if John's performance had not affected his performance it could lead to future problems, for instance car accidents, difficulties in relationships with clients, negative impression as a result of smelling of alcohol, etc.

How can Julia change the company's attitude? She should instigate training. Should the company's insurance cover be extended to cover alcohol dependence?

The group discussed personal experiences with professional colleagues who had had drinking problems and concluded that Julia should get professional (medical) advice that John was an alcoholic. However, the best foundation for intervention was deterioration in his work performance.

The company needed a policy which addressed the issue of disabilities, i.e. depression and alcoholism.

The group thought the company should give written notice to John to improve performance or face dismissal and provide access to medical advice and help.

It was felt that 3 weeks was not a sufficient period to allow someone to recover from problems of this kind. John should be given a reasonable time to come to terms with his problem.

It was also felt that 5 year employment contracts were undesirable and that the company's employment policy should be reviewed.

6.3 The Discussion - Second Group

The second group initially focused on the following issues:

- 1 was there anything the company *must do* to protect itself from claims?
- 2 was there anything that the company *must not do* as it would be unlawful?

The majority of the group concluded that the answer to both questions was "No".

There was discussion about the company's policy on health insurance. One member of the group was aware of the differential cost of medical insurance with and without cover for alcohol dependence. He made some calculations on his pocket calculator. On the basis of these a majority of the group thought it would be too expensive to include this in corporate medical insurance cover, although it might be appropriate to pay for it on a one off basis if the employee was worth it.

Most of the group were sure that they did not have this type of employee in their organisation. If they had they would look again at their recruitment and screening procedures to try to avoid taking on employees with drinking problems.

There was some discussion about different attitudes to drinking in different cultures, particularly those represented by different participants in the group. Most were surprised at the amount of drinking in offices and during working hours in England. Equivalent levels of drinking would not be acceptable in, for instance, the USA or Japan.

Was the company in a position summarily to dismiss John? It was thought the answer was "No", although it might be worth dismissing him in any event. There was discussion as to how much the cost of this might be.

One member of the group suggested offering assistance to John and treating alcoholism as an illness. If John had made it to senior lawyer in London he must have had a lot to offer the firm, provided that his drinking problem was dealt with. However, the majority felt that John had already had his chance, having been given 3 weeks off without any improvement. The only long term solution was felt to be a change in corporate attitude and more screening of potential employees.

7 CASE STUDY 6: DRINKING PROBLEMS IN A COURT SETTING

Any participants who looked as if they might be litigators or barristers were allocated to this group.

7.1 The problem

Bill is a litigation partner who enjoys using his rights of audience. He is representing the claimant, Andrew, in proceedings in the County Court. Patricia is representing the defendant Sam.

The case proceeds towards the hearing. Although Bill had not had to apply to the Court for an Order debaring the Defendant, the defence solicitors have appeared slow, and have had to be pushed to deal with disclosure, etc. Bill never seems to be able to speak to Patricia in the afternoons and her secretary never seems to know where she is. Andrew is a very demanding client, who is very upset about the delays.

A case management conference is fixed before a Circuit Judge. Patricia, however, has not fully complied with the terms of an earlier consent order. Bill makes an application returnable at the case management conference to debar the defendant from defending.

The case management conference is listed before His Honour Judge Smith, a judge with a very good reputation, but who does not suffer fools gladly. As this is a claim of some substance, both parties are to attend and be represented by their solicitors. Bill and Andrew arrive at court at 9.30, to have discussions, as agreed, prior to the hearing.

Neither Patricia, nor her client is present. When Patricia arrives at 10 minutes to 10, it is clear that she has been drinking. Bill recognises the symptoms of alcoholism, because his own wife drank herself to death and he himself got support through Al-Anon, a self help organisation for the friends and relatives of alcoholics. Patricia tells Bill that her client, Sam, will not be coming. Bill tries to discuss the arrangements for the hearing with Patricia, but it is obvious that Patricia is not able to deal with the matter.

There is a call on the tannoy for the parties to go into court. Patricia is slumped on a chair.

What should Bill do at the hearing, and what steps should he take in respect of Patricia's client, Sam?

How should Judge Smith deal with the situation?

7.2 The Discussion

One of the participants in this session mentioned that in France drinking is a very big problem amongst lawyers, despite the fact that there is a universal "no alcohol in the office" policy. They all, nonetheless, have a bottle of champagne in the cupboard for "celebrations". Afternoons in court are notable for the number of drunken advocates who appear. When someone in the group asked why the judges didn't do something about it, the answer was that the judges were often drunk as well.

The outcome of the discussion was noted as follows:

Bill

- has an obligation to defend the interest of his client, i.e. he should pursue the application to strike out the defence which had been listed for hearing that day,
- if asked by the court about the whereabouts of defendant's counsel, he must tell the court where Patricia is and the state she is perceived to be in,
- should inform the Law Society or the Bar (as the case may be) about Patricia's condition.

Judge Smith

- should enquire as to the reason for Patricia's absence,
- should have her brought to chambers and see for himself or get a report from the court clerk,
- should contact Patricia's law firm or chambers to see if someone else is in a position to defend Sam's interests (not likely if matter is of any particular size),
- if no-one is available to defend Sam's interests, he should postpone the matter and issue an order explaining why. If necessary he should inform Sam directly.

- should consider holding Patricia in contempt of court,
- should inform the Law Society or the Bar about Patricia's condition.

Patricia's firm/Chambers

- should consider disciplinary action and require Patricia to get treatment,
- should review its own processes and ask itself why it let things get to this point,
- might have to inform its insurers about a potential claim.

Sam

- has a potential claim for breach of contract, at least for the hearing in question, and, if the defence breaches were Patricia's fault and not those of Sam, for all fees paid, and a possible claim for malpractice if he ultimately loses the case.

Andrew

- will be really "mad"⁸ and won't understand anything that happens.

8 CASE STUDY 7: PROBLEM DRINKING AND FINANCIAL SERVICES

The participants in the discussion of this case study were allocated on the basis of their experience in financial services law and regulation (most being in house lawyers in banks, together with one or two specialists in securities law). They were provided with the results of a search on the web site of the Financial Services Authority⁹ on the word "alcohol".

8.1 The Problem

Lord Zouch ("HZ") is the chairman of the holding company of the Harry Zouch financial services conglomerate and of one of its subsidiaries, HZ Life Ltd, a long established authorised life insurance company that was taken over by the Harry Zouch Group about 5 years ago.

The chief executive of HZ life is Michael. HZ and Michael went to Eton together and have been close friends and drinking buddies ever since.

⁸ "mad" in the American sense, i.e. very angry.

⁹ <http://www.fsa.gov.uk>

HZ life has been having problems recently. It is badly affected by the recession and had for several years issued policies providing for guaranteed annuity rates as well as policies which did not contain such a guarantee.

Michael has been drinking very heavily for several years. HZ no longer enjoys meeting him and was shocked by his appearance the last time they were together. That was at a rather difficult meeting with the Financial Services Authority arising from concerns that HZ Life was sailing very close to its required minimum margin of solvency, committing breaches of the Conduct of Business rules, losing good staff, including its compliance officer, and having difficulty recruiting replacements.

Partly as a result of this meeting it is agreed that Monica, a solicitor who has been a compliance officer with a number of Harry Zouch companies (although not with HZ life), should be promoted to compliance director status at those companies and also at HZ Life. Monica is an alcoholic who stopped drinking 5 years ago and is active in Alcoholics Anonymous (although she concealed that aspect of her background when she completed the health declaration with her job application on joining the group 2 years ago).

Monica meets Michael on being appointed to the board of HZ Life. She realises that she has seen him before at a number of AA meetings, although he did not stick with AA. It is not clear to her whether Michael recognises her. Quite apart from their previous connection, it becomes apparent to Monica very quickly that Michael has a serious drinking problem and that many of HZ Life's problems stem from his alcoholism, combined with his dominating personality and the unwillingness of the other members of HZ Life's board to challenge him. He is barely on speaking terms with some of the company's professional advisers. She concludes that it is not practical to try to resolve the situation without either doing something about Michael's drinking or getting rid of him.

What should Monica do? What are the legal and regulatory implications of the situation?

8.2 The Regulatory Background

Most of the participants were familiar with the regulatory background to this case study. It may be helpful to give a very brief summary of relevant aspects of that background for the benefit of the non-specialised reader.

The Financial Services and Markets Act 2000 ("FISMA") came into force on 1st December 2001. It introduced a new integrated system of regulation applying to financial services (banks, investment companies, insurance companies, etc.). The regulator is the Financial Services Authority ("FSA"). The regime is contained in FISMA, statutory instruments made by the Treasury under FISMA, and rules and guidance made by the FSA itself.

One of the features of the regime is that it requires key personnel in regulated firms to be "fit and proper" and to be subject to prior approval by the FSA.

FSA's rules include some very lengthy and detailed guidance on matters such as solvency. They also include more high level and general rules such as the "Principles for Businesses".

Principle 4 requires a firm to:

"take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems".

Principle 11 provides that a firm:

"must deal with its regulators in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice".

The FSA's Statement of Principles and Code of Practice for Approved Persons provides to very much the same effect.

The FSA is subject to strict confidentiality obligations in regard to information supplied to it by regulated firms (section 348 FISMA).

8.3 The Discussion

The group did not come to a universal consensus on how Monica should handle the situation. The following points were identified.

As a member of the Board, Monica should have direct access to Harry Zouch ("HZ"), the Chairman. In addition, since she was appointed to the board only after HZ had met with the FSA and Michael, the CEO, to discuss HZ Life Ltd.'s shaky financial state and regulatory compliance, Monica should consider voicing her concerns about Michael to HZ directly.

She risks exposing herself to defamation claims because it is difficult to prove that: (a) Michael is an alcoholic; and (b) his alcoholism is a factor in HZ Life Ltd's problems.

One possibility might be to ask HZ to consider assigning a team of representatives to investigate the causes of HZ Life's unsatisfactory results of late and consider if key personal are "fit and proper" as required by the FSA.

Monica has issues herself as she is exercising a "controlled function" within the FSA "Approved Persons" regime. She is, therefore, also subject to the "fit and proper" requirements. She did not disclose her alcoholism in her job application.

Although Monica is no longer drinking and has been abstinent for some time, would the FSA have wished to know about her past problems in deeming her fit and proper to take her controlled person role as compliance director?

The search on the FSA web site identified the following statement¹⁰:

"We believe that the dismissal and/or suspension of an individual for drug and alcohol abuse should be taken into account in assessing fitness and propriety, but only insofar as it may have a bearing upon an individual's performance in the particular function."

The "London Code of Conduct for Principals and Broking Firms in the Wholesale Market" states at paragraph 6.5:

"Abused substances (including drugs and alcohol): Management should take all reasonable steps to educate themselves and their staff about possible signs and effects of the use of drugs and other abused substances. The judgment of any member of staff using such substances is likely to be impaired; dependence upon drugs etc. makes them more likely to be vulnerable to outside inducement to conduct business not necessarily in the best interests of the firm or the market generally and could seriously diminish their ability to function satisfactorily."

The view was expressed that, as Compliance Director, Monica should advise HZ that HZ Life Ltd should have an educational process for staff to learn about substance abuse. Monica should advise HZ to create a confidential reporting line on this issue to report substance abuse issues that may develop.

The group discussed whether the legal department for HZ Life Ltd, and more specifically the General Counsel, should be consulted so that Monica is fully aware of the legal consequences of her actions. She should be aware of the FSA requirements.

As a Compliance officer and director, Monica may have a regulatory duty to "whistleblow" (under the Public Interest Disclosure Act 1998) on HZ Life Ltd if HZ does not follow up on any of her suggestions. Would she be protected if she whistleblow on Michael's alcoholism alone, rather than its failure to do anything about it?

The group discussed whether Monica should speak with the Human Resources Department on a confidential basis about Michael's apparent problems with alcohol. Some members of the group felt that Monica may have subjectively jumped to conclusions in deciding that Michael's problems with alcohol have directly caused or contributed to HZ Life Ltd's financial problems.

9 CASE STUDY 8: THE PROBLEM BOSS AND MONEYLAUNDERING ISSUES

9.1 The Problem

¹⁰ at paragraph 4.63 of the FSA's Policy Statement "High Level standards for firms and individuals: Issues arising out of CP35 and CP26"

John is an assistant solicitor working in the private client department of a large city firm, Dodson & Fogg. He works closely with Julia, one of the partners. Julia has connections with the horse racing industry and most of her clients are wealthy owners. John is slowly getting to know the clients and how the industry works. However, he is beginning to be concerned about gossip of Julia's antics at the races. In particular, he has learnt that on several occasions she has been so drunk that she has been unable coherently to discuss business with owners at pre-race meetings. On one occasion when Dodson & Fogg had sponsored a race she had slurred her words and dropped the cut glass decanter she was presenting on behalf of the firm. John is also getting calls from clients asking why Julia has failed to turn up for meetings at training yards. So far, he has managed to cover up for her. None of the other partners seem to have noticed Julia's behaviour but John concludes that this is probably because so much of her work, including meetings, is conducted away from the office at places like Newmarket.

After John has been working with Julia for about a year she takes a prolonged holiday combining business with pleasure visiting a stud farm in Kentucky. John is responsible for all her files in her absence. He becomes increasingly worried about the chaotic state of some of her files. One file causes him particular concern. It relates to a fairly new client who is also new to horse racing. John does not particularly care for the client who has obviously come into a lot of money and who likes to throw his weight around.

The file contains several cheques but very little paper work. There is no indication of what the money represents or what Dodson & Fogg are supposed to do with it. John then examines the client account transactions in respect of this client to try and identify what transactions are current. His research makes him even more concerned. Julia appears to have opened several ledgers with titles such as "stud farm" and "trust fund" but the payments of large sums of money in and out are not properly annotated.

On talking to the accounts department John gets the distinct impression that others are worried about these transactions of money. Julia's secretary then says that Julia seems to be very afraid of the client and always needs "a stiff drink" to face him. John has a great deal of respect for Julia and does not want to get her into trouble. He does not know whether to wait for her return and raise his concerns with her or whether to speak to one of the other partners - none of whom know much about her work and her clients. He is also slightly concerned about his own position. He does not know whether to speak to the awkward client about the unrepresented cheques which are sitting on the file and, if he does, what he should say to the client.

How would you advise John?

9.2 The Discussion

The question was asked, what was the difference between this problem and problems stemming from other causes of professional misconduct or incompetence? A possible answer was the general reluctance within the profession to face up to alcohol related problems and the need to penetrate through the "denial".

The following issues were identified:

- possible breaches of moneylaundering requirements,
- control procedures and check within the firm (or the lack of them)
- possible involvement in criminal activities,
- problems in the running of the accounts department of the firm and in file management.

Possible options for John:

- report to firm's compliance officer (if any)
- report to Julia's line manager (if any)
- any mentoring arrangements within the firm for Julia or John to which resort might be had?
- raise the matter with any partner, who might understand the issue from John's point of view and/or realise that Julia has problems.

Should John wait until Julia gets back. Probably not, if she is an alcoholic, since she is likely to react irrationally, angrily, or vindictively. Her absence might help getting things done, rather than impeding progress.

A majority of the group thought there were enough facts to go to the firm's compliance officer, but others felt that John should not go over Julia's head as his supervising partner.

If John suspects illegal activity, he may have a legal duty to take action and voicing concerns to her might itself amount to the crime of tipping-off under moneylaundering rules.

What should John do about her alcohol problem and its impact on him? Should he raise the issue with her or report it to someone else (managing partner if any)? Should he call LawCare for advice? How sure is he that she really does have a drink problem?

Should John go to the client? The general view was that he should not, as this is an internal management matter and the client would take a dim view. Again reporting concerns to the client might amount to "tipping-off".

Should he ask for more information from the accounts department, or other sources? A majority considered that he should go immediately to the compliance officer in view of the significant risks to the firm.

The following potential related questions were identified:

- how large are the cheques?
- Who are they made out to?
- What are the concerns of the accounts department and how significant are they?
- How "shady" is the client?

10 FEEDBACK FROM THE CASE STUDIES

The session on substance abuse at the CLE conference lasted about an hour and a quarter and finished just before lunch. There was not enough time for the groups to reconvene and report back, so the notes recording the outcome of each of the discussions were written up and communicated to all the delegates by email about a month later. Oral comments on the session as reported by the organisers were very positive. However only 27 delegates out of about 80 completed feedback forms. On a scale of 5 being highest and 1 lowest the evaluation was as follows:

| QUESTION | 5 | 4 | 3 | 2 | 1 |
|---|----|----|---|---|---|
| To what extent were your personal objectives satisfied? | 13 | 6 | 2 | | 2 |
| To what extent did the environment contribute to the learning exercise? | 10 | 10 | 1 | | 1 |
| To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied? | 13 | 6 | 2 | | |
| To what extent did the activity contain significant current intellectual or practical content? | 11 | 8 | 3 | | 1 |

The following written comments were made:

"The small group discussion was a great way to discuss a difficult issue"

"Great idea to have working groups, especially broken into similar professional backgrounds"

"Break-out groups were dopey"

"An excellent session with an enjoyable and thought-provoking structure"

"Interactive sessions are the best as always"

"Very enjoyable format, more of similar presentations would be appreciated in future!"

"I think it will take a major culture shift in the UK before this profession adopts any sort of organised response to the problem among practitioners. [There is informal help, but you have to ask for it.] I am not even sure that a one-size-fits-all approach would necessarily be helpful. Remember, just because there is a problem, it does not mean that there has to be a solution. Thank you for your contribution, which I have found to be most interesting."

11 2003 CASE STUDY

I led the CLE training on substance abuse again in January 2003. I was again joined by Richard Steele and by Dr Deborah Brooke, a psychiatrist and Dr Wilkes, a medical practitioner associated with the Medical Council on Alcohol. On this occasion we did not break the audience into distinct groups. Instead we circulated a case study for discussion with all participants (some 100 plus) in one room. The discussion was preceded by a brief introduction and was not aimed at producing a record. Instead the topic of lawyer substance abuse was discussed in general terms with the case study being used as a means of illustrating the issues.

The case study was as follows

“Jane is the Solicitor to (i.e. the most senior lawyer at) the Ministry of Administrative Affairs. One level down from her in the Government Legal Service hierarchy (but still at a very senior level) is Michael. Michael is a brilliant and charming individual who is well liked by the ministers, not least because of his recent success in steering a difficult bill through Parliament. Jane and Michael had a brief affair 7 years ago. They still get on very well together.

Michael is bored of his work and desperately wants a change, but at the advanced age of 45 has difficulty getting a suitably prestigious job elsewhere. He is also drinking far too much, tends to get in very late on Monday mornings and is often seen lurching around the corridors of the ministry in the afternoon. However, he always seems to be able to pull himself together for meetings. Jane feels rather sorry for Michael who is unlikely to advance further in his career and wishes she could help him.

Morale within the legal division is not good. Jane necessarily has to concentrate on advising the ministers and is conscious that she is not a born manager. She knows that there are problems, but does not always have the time to fully to address them. A lot of the more junior lawyers do not have much interesting work to do, have inadequate secretarial support, and resent the unwillingness of their senior colleagues to delegate.

Many of them follow Michael's habits to a greater or lesser extent. Long tea breaks tend to be held and lawyers often drink heavily in the evenings (which is a bit embarrassing since the Ministry is supposed to be developing the government's policy on alcohol abuse). Several women lawyers in the legal division have been the subject of sexual advances on the part of Michael when he has had too much to drink.

While Jane is on holiday a crisis arises. A meeting is to be held by a minister to discuss the proposed launch of the government's alcohol policy. Michael announces the previous afternoon that he cannot attend, saying he has bad chest pains. The legal division is represented at the meeting by a lawyer one level down from Michael, Anne, who makes a poor impression, partly because she has only been peripherally involved previously and cannot make sense of the file.

When Jane gets back from holiday, she receives a report that the minister is "livid" about this and similar incidents where he considers that incompetent lawyers in the division have let him down. He wants her to sort things out. He expressly exonerates Michael who has apologised to him for Anne's incompetence. In her intray Jane finds a letter from the chairman of Suregain Bank plc seeking a reference for Michael, whom the bank is proposing to appoint as general counsel, and a notification from the head of human resources that Anne has raised a formal grievance against Michael about his criticism of her to the minister and his behaviour to her at a recent "leaving" party. The letter from Suregain asks a lot of uncomfortable questions about Michael's health and sickness record, personality and behaviour, as well as his legal abilities.

How should Jane try to resolve these issues?